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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department, *Petitioner,*

v.

FRANCIS MUSCARE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES, AMICUS CURIAE

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MOTION OF COALITION OF AMERICAN PUBLIC EMPLOYEES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, the Coalition of American Public Employees respectfully moves for leave to file the attached brief as *amicus curiae*. Respondent has consented to the filing of this brief; petitioner has advised that it "will neither agree nor oppose your application to file such an amicus curiae brief."

The Coalition is an association of six organizations which represent public employees in a variety of professions and occupations at all levels of government. The combined membership of these organizations is ap-

proximately three million, and they act as collective bargaining representative for approximately five million employees.

The Coalition's constituent organizations are the following:

The *National Education Association* (NEA), which is the largest teacher organization in the United States, and has a membership of approximately 1.7 million educators, most of whom are employed in public educational institutions.

The *American Federation of State, County, and Municipal Employees* (AFSCME), AFL-CIO, whose membership is comprised of approximately 750,000 employees of state and local governments.

The *National Treasury Employees Union* (NTEU), whose 75,000 members are non-supervisory employees of the United States Department of the Treasury.

The *American Nurses' Association* (ANA), which has 205,000 members, many of whom are employed in state and local governmental institutions.

The *Physicians' National Housestaff Association* (PNHA), which has a membership of approximately 18,000 physician housestaff officers, predominantly interns and residents, many of whom are employed by state and local institutions.

The *National Association of Social Workers* (NASW), which has 64,000 members, many of whom are employed by state and local governments.

The present case presents an issue of vital importance to these organizations and their members: whether a public employee who is accused of misconduct in his

job is entitled to notice and hearing before he can be suspended without pay or otherwise punished. The Coalition has previously participated as *amicus* in other cases before this Court which raise significant issues pertaining to the procedural due process rights of public employees. Thus, the Coalition filed a brief in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), and has also filed a brief in the pending case of *Bishop* v. *Wood,* No. 74-1303. Accordingly, the Coalition desires to present its views to the Court concerning the issues raised in the present case.

While the parties will necessarily concentrate their attention on the particular facts and circumstances of this case, our brief deals somewhat more broadly with the underlying constitutional issues. For example, our brief discusses the question of the type of hearing required in cases of this kind—a matter which, we understand, will not be discussed in the brief for respondent. Thus, although one purpose of this brief is to express support for the position of respondent and the decision of the court below, we also believe that we can shed some additional light on the issues presented and thus be of assistance to the Court.

Respectfully submitted,

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BRIEF FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES, AMICUS CURIAE

SUMMARY OF THE FACTS

Since the parties' briefs will describe the facts of this case in detail, we will summarize here only those elements which we consider especially pertinent to the issues discussed in this brief.

Respondent Francis Muscare, the plaintiff below, has been employed as a firefighter with the Chicago Fire De-

partment since 1955. He currently holds the rank of lieutenant.

The Department has a rule, entitled "proper personal appearance," which requires its employees to "present a clean and proper appearance in personal care and attire at all times." The rule further states:

> "The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible." (A. 13.)

Despite this rule, Muscare has from time to time worn a small beard or goatee. In the past he had been chastised for this, but until the present case arose no punitive action had been taken against him. (A. 122-25.)

In October 1973 Muscare again grew a goatee. In December of that year he attended a class on the use of self-contained breathing apparatus, at which the instructor, one Leonard Johnson, stated that facial hair often interferes with the proper fit of the face mask on such apparatus. Muscare testified at trial, however, that he has frequently used the breathing apparatus over his beard without difficulty, both in actual fire conditions and in drills. (A. 126-28).[1]

Johnson reported to his superiors that Muscare was wearing a beard, and expressed concern that "he wouldn't get a good seal on the face piece." (A. 71.) Shortly thereafter Muscare was instructed by his superior officer, Chief Morgan, to remove the beard. When he failed to do so, Morgan filed a "charge" against him

[1] Petitioner's witnesses conceded at trial that only the person wearing the face mask can determine whether he has obtained a good seal. (A. 67, 93-94, 111.)

within the Department. (A. 19.) Muscare was never given a copy of this charge or told precisely what it contained. Nor was he given any hearing or other opportunity to explain or defend his conduct.

In accordance with Department procedures, the charge was referred to Acting Fire Marshall William F. Foley, who received it on December 21, 1973. (A. 104.) A few days later, Foley was hospitalized with appendicitis, and he did not return to duty until February 10 or 12. (A. 105.) During his absence, no action was taken with respect to the charge against Muscare. (A. 109.)

On February 27, 1974—more than two months after the filing of the charge—Muscare was orally notified that he was being suspended, effective immediately. Several days later, he received a formal written notice (A. 12) that he was suspended without pay for 29 days, from February 27 to March 28, for violating Sections 61.001, 61.006 and 51.133 of the Department's regulations. Section 51.133 is the "personal appearance" regulation referred to above. The other two rules cited in the notice list as punishable offenses "Conduct unbecoming a member or employee of the Chicago Fire Department" and "Disobedience of Orders." (A. 14.) There is no prescribed punishment for violation of any of these regulations; the penalty is entirely within the discretion of the Chief Fire Marshal. (A. 134.)

On these facts, the Court of Appeals held that the Department's failure to provide Muscare with notice and some form of hearing prior to the suspension violated his right to procedural due process. Although Muscare had a right under Illinois law to appeal his suspension to the Chicago Civil Service Commission, the

court concluded that such post-suspension review would not satisfy the requirements of due process. The court found it unnecessary to determine precisely what type of pre-suspension hearing Muscare was entitled to, "since no hearing of any kind was accorded appellant prior to his suspension." (A. 164.) The court also found it unnecessary to pass on the constitutionality of the Department's personal appearance regulation.[2]

[2] Petitioner argues that if this Court reverses the Court of Appeals' decision on the due process issue, it should proceed to decide the constitutionality of the personal appearance regulation, rather than remanding the case for a determination of that issue. Our view, of course, is that the Court should affirm the decision below, which would make it unnecessary to reach the personal appearance issue. In any event, the question of the extent to which a governmental agency can constitutionally regulate the personal appearance of its employees is pending before this Court in another case, *Barry* v. *Dwen*, No. 74-1269, which has already been argued and may be shortly decided. In these circumstances, we will not brief this issue. Suffice it to say that we agree with what appears to be the prevailing view among the lower federal courts, namely that the constitutional concept of "liberty" includes a person's right to choose his own hair style or decide for himself whether to wear a beard, and that any limitation on that right must be justified by some overriding governmental need. Although petitioner has attempted to justify the rule in this case on the ground that it is designed to insure the safe use of face masks, the court below was plainly correct in noting that the rule "does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn." (A. 160 n.2.) Moreover, as pointed out above, Muscare testified that his particular beard does not interfere with his ability to use a face mask.

ARGUMENT

THE SUSPENSION OF MUSCARE WITHOUT PRIOR NOTICE AND HEARING VIOLATED HIS RIGHT TO PROCEDURAL DUE PROCESS, SINCE HE HAD A "PROPERTY" INTEREST IN HIS JOB AND THERE WERE NO EXIGENT CIRCUMSTANCES REQUIRING HIS IMMEDIATE REMOVAL

There appears to be no dispute in this case that the 29-day suspension and consequent loss of pay imposed on Muscare deprived him of "property" within the meaning of the due process clause of the Fourteenth Amendment. As this Court made clear in *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), an employee has a "property" interest in his job if he has "a legitimate claim of entitlement to it," i.e., if he can only be deprived of it for "sufficient cause." See also *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975). That is certainly the situation here. Muscare was a member of the "classified civil service" entitled to the protection of Section 10-1-18 of the Illinois Municipal Code (Ill.Rev.Stat. 1973, ch. 24), which provides as follows:

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

While the word "cause" does not appear in reference to a suspension of less than 30 days, the statute as a whole, particularly the provision for civil service commission review of "the propriety of such suspension," makes clear that "cause" is required, and petitioner does not contend otherwise. The only distinction between a suspension of more than 30 days and a shorter suspension is that in the former case the statute requires a prior hearing, while in the latter case only a post-suspension hearing is provided.

The question thus presented is whether the post-suspension hearing contemplated by the statute satisfies the requirements of due process. We submit that it does not. As we shall show, the decisions of this Court have consistently held that notice and hearing must be afforded before, not after, a person is deprived of property or liberty, unless there is some overriding governmental need for immediate action which justifies postponing the hearing until after the event. As we shall also show, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), upon which petitioner relies, is not inconsistent with this principle and does not justify the failure to provide a pre-suspension hearing in this case. Finally, we shall demonstrate that there is no merit in petitioner's contention that, because Muscare's violation of the no-beard rule was apparent and uncontrovertible, no hearing was required in this case.

A. In the Absence of Unusual Circumstances Which Are Not Present Here, Notice and Hearing Must Be Provided Before, Not After, a Person Is Deprived of Property or Liberty

In *Board of Regents* v. *Roth, supra,* this Court stated: "When protected interests are implicated, the right to some kind of *prior* hearing is paramount." 408 U.S. at 569-70 (emphasis added). This statement

was followed by a long footnote succinctly summarizing the applicable constitutional principles:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' Bell v. Burson, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e.g.*, Central Union Trust Co. v. Garvan, 254 U.S. 554, 566; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597; Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594." *Id.* at 570 n.7 (emphasis in original).

The Court further stated that while " '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings' . . . [t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." *Id.* at n.8. (Emphasis in original.) Thus, the fact that the present case involves a 29-day suspension rather than a longer suspension or a dismissal does not obviate the need for "some form" of prior hearing.

The effect of *Roth* was to make applicable to the area of public employment the due process principles which the Court has frequently applied in other contexts. Thus, in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the Court held that a prejudgment garnishment of wages without prior notice and hearing violated due process, even though such garnishment merely served to freeze the employee's wages pending a trial of the underlying claim. It is noteworthy that the amount involved in *Sniadach* was only $31.59, far less than the approximately $1,400 which Muscare lost as a result of his suspension. Similarly, in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court held that a prior evidentiary hearing is required before welfare benefits can be terminated, and that a procedure which provides only a post-termination hearing violates due process. The same principle was applied to the suspension of a driver's license in *Bell* v. *Burson,* 402 U.S. 535 (1971), to the repossession of personal property in *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), to the revocation of parole in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and to the suspension of public school students in *Goss* v. *Lopez,* 419 U.S. 565 (1975).[3]

In all of these cases, of course, the Court recognized that an exception to the prior-hearing requirement

[3] Petitioner characterizes *Goss* as merely holding that a hearing is required "either before or promptly after" a student is suspended. (Pet.Br. 20.) In fact, however, the Court held that "as a general rule notice and hearing should precede removal of the student from school." Only if the student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process" may he be "immediately removed from school," in which event the hearing "should follow as soon as practicable." 419 U.S. at 582-83.

can be made "in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Roth, supra,* 408 U.S. at 570 n.7 (quoting *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971)). "Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of bank failure, and to protect the public from misbranded drugs and contaminated food." *Fuentes* v. *Shevin, supra,* 407 U.S. at 91-92 (footnotes omitted). This exception, however, applies only to "emergency situations," *Bell* v. *Burson, supra,* 402 U.S. at 542, "where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance." *Goldberg* v. *Kelly, supra,* 397 U.S. at 263 n.10 (quoting *R. A. Holman & Co.* v. *SEC,* 299 F.2d 127, 131 (D.C.Cir.), *cert. denied,* 370 U.S. 911 (1962)).

No such emergency situation is involved in this case. Muscare did not present a "continuing danger to persons or property or an ongoing threat of disrupt[ion]" which required his "immediate removal" from the job. *Goss* v. *Lopez, supra,* 419 U.S. at 582. The fact that no action was taken for more than two months after the original "charge" was filed against him demonstrates that the Department did not consider the matter to be of any particular urgency. The governmental interest at stake here was not the need to eliminate an immediate threat to the efficient operation of the Department, but merely the desire to punish an employee for an alleged violation of a rule. In such a situation, a hearing must precede, not follow, the determination of guilt and the imposition of punishment.

B. Arnett v. Kennedy Does Not Support the Department's Failure To Provide a Pre-Suspension Hearing

Petitioner contends that in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), "a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and back pay if the removal decision is later found to have been wrongful." (Pet. Br. 21.) In fact, however, *Arnett* provides no support for petitioner's position here. To demonstrate this, it is necessary to analyze the separate opinions in that case, since there was no opinion for the Court.

Arnett involved a challenge to the constitutionality of the dismissal procedures applicable to certain federal employees under the Lloyd-LaFollette Act, 5 U.S.C. § 7501, as supplemented by regulations of the Civil Service Commission. Those procedures provide (1) 30 days' advance written notice of any proposed dismissal, with a full statement of reasons, (2) an opportunity during such 30-day period for the employee to examine any material on which the charges against him are based, including statements of witnesses, documents, and investigative reports, (3) an opportunity to answer the charges orally and/or in writing, and to submit affidavits in support of such answer, *before* a final decision is made, and (4) a right to a full trial-type hearing *after* the dismissal becomes effective, before a neutral hearing officer who has authority to award reinstatement and back pay.

The issue in *Arnett* was *not* whether the employee was entitled to notice and "some form" of hearing prior to his dismissal. He had been provided a notice and a type of hearing—i.e., an opportunity to answer the charges against him, orally and in writing—before

his discharge became effective. The employee claimed, however, that these pre-dismissal procedures were constitutionally inadequate, that he was entitled to a full trial-type hearing before he could be removed from his job.

The plurality opinion, written by Justice Rehnquist and joined by the Chief Justice and Justice Stewart, did not reach the question of whether the procedures under review satisfied constitutional standards of procedural due process. Because those procedures were provided by the same statute which established the employee's right to be discharged only for "cause," and because in the absence of such statute an employee could be summarily dismissed for any reason whatever, the plurality reasoned that the procedures were a limitation on the employee's "property" right, and that the employee therefore had no constitutional claim to any greater procedural safeguards than those which the statute itself provided. As the opinion put it, "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but rather such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." *Id.* at 152.

The plurality's views, however, were expressly rejected by the other six Justices who participated in *Arnett.* See *id.* at 166-67 (concurring opinion of Justice Powell), 177-78, 185 (opinion of Justice White, concurring in part and dissenting in part), and 210-11 (dissenting opinion of Justice Marshall). As Justice White put it:

> "The fact that the origins of the property right are with the State makes no difference for the

> nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition." *Id.* at 185.[4]

Justice Powell, in an opinion joined by Justice Blackmun, concurred in the result reached by the plurality "on the basis of different reasoning." *Id.* at 164. After first determining (contrary to the plurality's view) that constitutional due process standards must be applied, the concurring opinion stated that the question of whether a full evidentiary hearing must be provided before dismissal "depends on a balancing process in which the Government's interest in expeditious removal of an employee is weighed against the interest of the affected employee in continued employment." *Id.* at 167-68. In concluding that the Government's interest outweighed the employee's, the concurring opinion stressed two factors which are not present in this case. First, it argued that the Government must be able "to remove employees whose conduct hinders efficient operations and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[4] The lower federal courts have recognized that the reasoning of the plurality was rejected by the rest of the Court and therefore is not the law. See, e.g., *Geneva Towers Tenants Organization* v. *Federal Mtge. Investors,* 504 F.2d 483, 489 (9th Cir. 1974); *Peacock* v. *Board of Regents,* 510 F.2d 1324, 1328 n.4 (9th Cir. 1975), *cert. denied,* 422 U.S. 1049 (1975); *Mattern* v. *Weinberger,* 519 F.2d 150, 160 n.20 (3d Cir. 1975); *Mondell* v. *Mayor and City Council of Baltimore,* 378 F.Supp. 219, 222 (D.Md. 1974).

Id. at 168. Second, it pointed out that the pre-dismissal procedures which had been provided, and which included notice of the charges and an opportunity to answer them, were sufficient to "minimize the risk of error in the initial removal decision." *Id.* at 170.

A quite different situation is presented here. First of all, the present case, unlike *Arnett,* involves a suspension imposed as a penalty, not a dismissal of an unwanted employee. There is no claim here that Muscare's conduct so "hinder[ed] efficient operations" or was so "disruptive or otherwise unsatisfactory" that his continued employment would "affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of" the Department. The purpose of the suspension was not to remove Muscare from the work place, but merely to punish him for an alleged violation of Department rules. Thus, no legitimate interest of the Department would have been impaired if the imposition of such penalty had been deferred pending notice and hearing.

Furthermore, Muscare, unlike the employee in *Arnett,* was not given any notice of the charges against him or any opportunity to respond to those charges prior to his dismissal. In *Arnett,* the employee did receive "some form" of hearing, and the question was whether the type of hearing provided was adequate. The balancing-of-interests approach of the concurring opinion in *Arnett* has traditionally been used by the Court in resolving that kind of issue. See *Roth, supra,* 408 U.S. at 570 n. 8. However, "[t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a property interest . . .

does not depend upon such a narrow balancing process." *Ibid.* (emphasis in original).

The other opinions in *Arnett* held that the procedural safeguards provided to the employee in that case fell short of satisfying due process standards. Justice White was of the view that some form of pre-dismissal hearing is required, but that it need not be a full trial-type hearing. He concluded that the notice and opportunity to answer charges provided by the statute and regulations were adequate, but that the decision at that stage must be made by an "impartial decisionmaker." Since he found that the decisionmaker in *Arnett* was not impartial, he concluded that the requirements of due process had not been met.

The other dissenting Justices, Marshall, Douglas and Brennan, all would have held that the employee is entitled to a full trial-type hearing prior to his dismissal.

In short, *none* of the several opinions in *Arnett* stands for the proposition that a public employee with a property interest in his job can constitutionally be dismissed or suspended without *any* form of prior notice and hearing. The plurality did not reach the constitutional issue, and the other opinions all focused on the question of whether a full trial-type hearing must be afforded before dismissal or whether the lesser type of pre-termination hearing provided in that case was adequate. As the Court itself recently observed, *Arnett* presented the issue of a "tenured employee's right to a preremoval hearing . . . only in the context of a statute providing notice and opportunity to respond in writing before removal coupled with a full hearing after removal." *Boehning* v. *Indiana State*

Employees Ass'n, Inc., 44 U.S.L. Week 3275 n.* (Nov. 11, 1975).[5]

That *Arnett* did not modify the long-standing principle that "some form" of hearing is required before there can be any deprivation of liberty or property is made clear by the subsequent decision in *Goss* v. *Lopez*, 419 U.S. 565 (1975). That case involved the suspension of public school students for a period of 10 days, a deprivation which is certainly far less severe than the 29-day suspension without pay involved in this case. While the Court held that only a rudimentary form of notice and hearing is required, it made clear that "as a general rule the notice and hearing should precede removal of the student from the school." *Id.* at 582. The Court also noted that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* at 584.

Since Muscare was given no prior hearing of any kind, it is not necessary for this Court to decide precisely what type of hearing was required to satisfy due process in this case. The Court may nevertheless wish to address this question, however, and we will therefore briefly state our views on the matter.

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[5] Subsequent to *Arnett*, there have been two cases brought in the federal courts challenging public employee dismissal procedures which provided only post-dismissal hearings, but no pre-dismissal hearing of any sort. In both cases, the courts held, in well-reasoned opinions which analyzed *Arnett* essentially as we have done above, that some form of pre-dismissal notice and hearing akin to that provided in *Arnett* is constitutionally required. *Eley* v. *Morris*, 390 F.Supp. 913 (N.D.Ga. 1975) (3-judge court); *Young* v. *Hutchins*, 383 F. Supp. 1167 (M.D.Fla. 1974).

We submit that the abbreviated type of pre-deprivation hearing which was upheld in *Arnett* and deemed sufficient in *Goss* would not be adequate in the kind of situation involved here. In *Arnett,* the Government's interest in promptly eliminating an unwanted and allegedly disruptive employee was considered—at least by three Justices—to outweigh the employee's interest in more effective pre-dismissal safeguards. In *Goss,* the Court held that only a brief and informal hearing was required because of the relatively mild character of the deprivation involved in that case. Neither of these considerations is applicable here. Certainly a 29-day suspension—which cost Muscare approximately $1,400—is a very serious deprivation to a working man. As the Court of Appeals noted, "[s]uch a financial blow can be disastrous to many civil servants." (A. 164 n. 3.) And where the government's interest is in penalizing an employee for alleged misconduct rather than permanently removing him from his job, there is no need—and therefore no justification—for delaying the full hearing until after the penalty has been imposed.

Accordingly, we believe that before a public employee can be made to suffer a significant loss of pay or other substantial penalty for alleged misconduct, he must be afforded the type of hearing which the Court has required "[i]n almost every setting where important decisions turn on questions of fact," namely, one which includes "an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970) (and cases cited therein). The other safeguards required in *Goldberg*—including an impartial decisionmaker, the right to counsel, the right to present evidence and argument, and the right

to a reasoned decision based on the hearing record—should also be provided. These rights have long been considered the essential elements of due process, and the reasons relied upon for not providing such safeguards in *Arnett* and *Goss* are not applicable here.

C. The Need for a Hearing in This Case

Petitioner's brief suggests that no purpose would have been served by a hearing in this case, since Muscare "admitted that he was familiar with the departmental safety regulation governing facial hair" and his "contemptuous defiance of the regulation and the orders of his superiors was open and unmistakable." "The only actual issue in dispute," petitioner contends, "was the constitutional validity of the departmental facial hair rule. But that could not be determined by an administrative hearing." (Pet. Br. p. 31.)

This argument will not withstand analysis. The ultimate issue to be decided within the Department was not simply whether Muscare had violated a regulation, but also whether the nature of the violation and the surrounding circumstances were such as to warrant punitive action—and, if so, what the penalty should be. There was no rule requiring suspension of any fireman wearing a beard—and certainly no rule requiring a suspension of 29 days. The penalty to be imposed, if any, was a matter to be determined by the Chief Fire Marshal. Thus, even if Muscare could not deny that he had violated the regulation, a hearing was required to give him an opportunity to explain or justify his conduct, or to show mitigating circumstances. As this Court stated in *Morrissey* v. *Brewer,* 408 U.S. 471, 488 (1972), "[t]he parolee must have an opportunity to be heard and to show, if he can, that he did not violate the

conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." See also *Cooke* v. *United States*, 267 U.S. 517, 538 (1925) ("evidence bearing on the degree of guilt and the penalty to be imposed" are a "proper part of the defense" in a contempt hearing); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973) (even where a violation of probation is a "matter of record," there may be "reasons which justified or mitigated the violation and make revocation inappropriate").

Even petitioner does not claim that a 29-day suspension is necessarily an appropriate penalty for any violation of the no-beard rule. Rather, petitioner argues that Muscare was guilty of "contemptuous defiance of the regulation" and "open and unmistakable" disobedience of orders. However, the only fair and reliable way to determine whether these characterizations of Muscare's conduct are accurate is on the basis of evidence presented at a hearing. Such a hearing, we submit, should have been held within the Department *before* any action was taken against Muscare.

Petitioner's contention that Muscare was "defiant" and flagrantly insubordinate is apparently based on the evidence presented at the trial of this case. Since this was not one of the issues to be determined in this litigation, however, it cannot be assumed that all of the evidence pertaining to it has been presented. We do not know, for example, whether Muscare had obtained legal advice as to whether he had a constitutional right to wear a beard. If an attorney had advised him that the regulation was unconstitutional and need not be obeyed, that would certainly tend to mitigate any claim of defiance or deliberate insubordination. We also do not know the extent to which the rule had been enforced

against other employees. *Cf. Ramsey* v. *Hopkins*, 320 F.Supp. 477 (N.D.Ala. 1970), *remanded*, 447 F.2d 128 (5th Cir. 1971). It may be that the Department's prior conduct toward Muscare or other employees with beards had created the impression that the regulation was not to be taken seriously, or that it need only be obeyed at ceremonial occasions such as inspections and the like. After all, Muscare had worn a beard in the past, and while he had been directed to remove it he had never previously been punished for it. Moreover, it appears that no one objected to Muscare's latest beard for several months after he grew it.[6]

A hearing would also have given Muscare an opportunity to explain why it was important to him to wear a goatee. We do not know whether it was intended solely to enhance his appearance, or whether it had some religious or cultural significance. *Cf. Finot* v. *Pasadena City Board of Education*, 250 Cal.App.2d 189, 58 Cal. Reptr. 520 (1968); *Braxton* v. *Board of Pub. Instr.*, 303 F.Supp. 958 (M.D.Fla. 1969). Even if the reason given would not justify the violation of the rule, it would be a factor to be weighed in determining the penalty to be imposed.

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[6] In explaining why he decided to punish Muscare as severely as he did, the Chief Fire Marshal cited the fact that Muscare had violated the beard regulation in the past, and had not complied during the two-month period that the charge was pending. Indeed, he testified that he had first contemplated only "a minimum action," but decided on a more severe penalty when he learned that Muscare had not shaved his beard while the charge was pending. (A. 134.) On the other hand, Muscare may have concluded, from the fact that he had not been punished in the past and the fact that no action was taken on the charge for a considerable period, that the Department did not consider his violation to be very serious or important. Thus, the same circumstances which in the Fire Marshal's view served to aggravate the offense may have led Muscare to minimize the importance of the matter.

Another matter which might have been raised at a hearing is whether, in fact, Muscare's beard would interfere with his ability to safely use the self-contained breathing apparatus. Throughout this case, the Department has vigorously asserted that the reason for the rule is that facial hair generally interferes with the proper use of such equipment. To be sure, the Department also contends that it has a right to impose a general rule, even though in individual cases a face mask can successfully be worn over a beard. But even assuming the validity of such a general rule, the Chief Fire Marshal might have been less inclined to punish Muscare—or to punish him so severely—if Muscare had been able to show, at a hearing, that he was able properly and safely to use a face mask despite his beard.

In short, petitioner's contention that there was no need for a hearing in this case is without merit. Even though Muscare could hardly deny the existence of his beard, a hearing was nevertheless required to determine whether punitive action was appropriate, and, if so, what the penalty should be.

There is, moreover, an even more fundamental answer to petitioner's argument. This Court has never held, in cases dealing with procedural due process, that a person's right to a hearing is dependent upon his ability to show in advance that there are disputed issues to be resolved at such a hearing. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), for example, the Court did not hold that a wage-earner must show that he has a colorable defense to the underlying claim against him before he is entitled to a hearing with respect to the garnishment of his wages.

In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court did not hold that a welfare recipient threatened with termination of his benefits must show the existence of a legitimate issue relating to his eligibility before he is entitled to a hearing. In *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), the Court did not hold that a parolee must show that he has some basis for contesting the revocation of his parole before he is entitled to a hearing on the matter. In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), the Court did not hold that a conditional-sales purchaser must produce evidence that he is not in default on his debt before he is entitled to a hearing with respect to the repossession of his property. In all of these cases, it was the nature of the deprivation involved which created the right to a hearing, not the nature of the issues in dispute between the parties.

When a hearing is held, of course, the procedures to be followed can be tailored to fit the issues actually raised at such hearing. For example, if it should appear in a particular case that the facts are not in dispute, there would be no need for the testimony of witnesses and the hearing could be limited to the presentation of arguments. But there must be some kind of hearing, "appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950), whenever a deprivation of liberty or property is involved. To hold that this right depends upon a prior showing that there are in fact disputed issues to be resolved in such a hearing would merely create uncertainty and foster needless litigation.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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